Cafe Tartuffo, Inc. d/b/a Fiorella *and* Local 6, Hotel, Restaurant and Club Employees and Bartenders Union, AFL–CIO, Petitioner. Case 2–RC–19044

April 23, 1982

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

Pursuant to authority granted it by the National Labor Relations Board under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered objections to an election held on July 9, 1981, and the Regional Director's report recommending disposition of same.[1] The Board has reviewed the record in light of the Employer's exceptions and the briefs filed in this proceeding and has decided to affirm the Regional Director's findings and recommendations only to the extent consistent herewith.

The Regional Director recommended that Petitioner's Objections 1 and 4 be sustained, that the election held herein be set aside, and that a second election be directed. Petitioner's Objection 1 alleged that the Employer had engaged in an impermissible promise of benefits, and an impermissible threat of loss of certain existing employment conditions if Petitioner won the election. While the Regional Director found merit in this objection, we reverse that conclusion for the following reasons.[2]

We first note certain facts as background to our decision. It appears that Petitioner represents the employees at Fiorello's Roman Cafe, Inc., another restaurant owned by the same Employer and located on the West Side several blocks from the Employer. It also appears that, sometime in the spring of 1981, Fiorello's Roman Cafe and Petitioner entered into a collective-bargaining agreement covering employees of Fiorello's Roman Cafe.

The sole issue in this proceeding is whether an Employer letter, dated June 25, 1981,[3] signed by the Employer's general manager, and distributed to all unit employees at their residences approximately 2 weeks before the election, contained objectionable statements.

The first three paragraphs of the letter read as follows:[4]

> Dear Fellow Employees:
>
> [1] As you know, there will be a Union Election on July 9. At that Election each of you will have the opportunity to vote to determine whether or not you want to be represented by the restaurant workers' union.
>
> [2] You are much luckier than the employees at FIORELLO'S, our restaurant on the west side. Some time ago those employees voted to be represented by the restaurant workers' union. They were led down the primrose path by union promises of increased wages and benefits. In fact, after the Election the Union negotiated a contract with the restaurant management which, in my opinion, gave the employees at Fiorello's no more than they would have gotten had there been no union—and probably gave them less. In addition, I believe many of those employees will be hurt by the inflexibility of the Union contract.
>
> [3] On the other hand, you know from the experience of the Fiorello's employees exactly the kind of contract the Union would negotiate if it became your collective bargaining representative. A contract which produces nothing more than you would expect to receive were there no union in the picture. For that, you are afforded the privilege of paying Union dues.

Paragraph 6 of the letter stated:

> [6] The restaurant does not want a union at FIORELLA'S! Our experience on the west side has shown that we can negotiate an agreement with the Union which does not cost us any more in wages and benefits than without the Union and may even cost less. But our experience on the west side has also shown us that the presence of the Union results in a tense working relationship with extreme disharmony among the employees. This is a real cost to everyone. It can result in a loss of customers and a loss of income to our employees who serve those customers, as well as to the restaurant itself. The Union benefits no one but itself.

[1] The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. Ten voters cast ballots for, and 18 cast ballots against, Petitioner. There was one challenged ballot, a number insufficient to affect the election results. Petitioner thereafter filed four objections to the election. Petitioner subsequently requested, and the Regional Director approved, the withdrawal of two of the objections, and thereafter the Regional Director ruled on the remaining two objections.

[2] We note that Objection 4, which the Regional Director also sustained, was in the nature of a catchall objection and alleged that, by the conduct set out in Objections 1–3 as well as by other unspecified actions, the Employer had engaged in objectionable conduct. However, the Regional Director set out as objectionable no conduct other than that detailed in Objection 1, so it is clear that the issues before us are those raised by Objection 1 only.

[3] All dates hereinafter are in 1981, unless indicated otherwise.

[4] The letter is attached in its entirety as Appendix A.

With respect to paragraph 2 of the letter, the Regional Director noted that the letter makes reference to the election conducted at Fiorello's Roman Cafe and the collective-bargaining agreement Fiorello's Roman Cafe negotiated with Petitioner. While the letter indicated that the employees had "probably" received "less" with the Union, the Regional Director found that Fiorello's Roman Cafe employees had, in fact, gained a wage increase that was greater than that obtained previously and also had acquired various additional benefits. He then noted paragraph six of the letter and that paragraph's second sentence which stated that the Employer could negotiate an agreement with the Union that would not cost it any more money than without a union and might cost it less.

The Regional Director concluded that the language in paragraphs 2 and 6 of the letter could reasonably be considered to imply that the Employer would provide its employees with the same planned benefits whether or not they chose a union. He therefore determined that, taken in concert, paragraphs 2 and 6 constituted a promise of benefit if employees rejected the Union and indicated the futility of selecting the Union. Further, the Regional Director found objectionable the language at paragraph 3 of the letter that the Employer could negotiate "a contract which produces nothing more than you would expect to receive were there no Union in the picture. For that you are afforded the privilege of paying Union dues." The Regional Director found this language conveyed the impression that not only would no new benefits redound to the employees with a union but that the employees would "lose benefits" because they would have the additional requirement of paying dues. The Regional Director also found that paragraph 6 of the letter contained threats to employees because it would "put [unit employees] in fear of losing money, and possibly . . . their jobs" if they voted for Petitioner.

As noted, we disagree with the Regional Director's findings. First, we conclude that the objected-to portions of paragraph 2 of the letter clearly constitute legitimate compaign propaganda. The Employer is simply stating its opinion relative to a contract at another location. The letter cannot be read fairly to state or imply that the Employer acting independently would grant the same wages and benefits to its employees that were negotiated at Fiorello's Roman Cafe.[5]

Nor does paragraph 6 constitute or contain a promise of benefits. Rather, it is nothing more than the Employer's opinion of the outcome of negotiations at the Fiorello's Roman Cafe location and its opinion that, based on those negotiations, Petitioner would likely be willing to negotiate a contract which would not result in significant increases for the Employer's employees. Such comments clearly are protected by Section 8(c) of the Act.

For essentially the same reasons, we find no objectionable statements in paragraph 3 of the letter. There, the Employer merely reiterates its view of the contract that Petitioner had negotiated at the Fiorello's Roman Cafe restaurant. The paragraph does not indicate what the Employer's position would be if Petitioner won the election but again only indicates its view of what Petitioner's position in negotiations would be. The Employer is not prohibited from making such statements. Further, there is no basis for finding that the Employer impermissibly indicated to the employees involved here that selecting Petitioner would be futile. Thus, the Employer did not indicate it had a fixed position with regard to what it would offer in negotiations, but rather only offered its opinion of what Petitioner would seek in those negotiations.[6]

[5] In its exceptions, the Employer contends that the Regional Director failed to investigate fully the circumstances surrounding the dissemination of its June 25 letter. The Employer claims it held a general meeting with its employees on June 15, at which time it distributed copies of the collective-bargaining agreement between the Union and Fiorello's Roman Cafe. Furthermore, the Employer alleges that it informed its employees at that time of Petitioner's purported offer to sign the *same* agreement for Fiorella employees if the Employer would agree to forgo an election or, alternatively, if the election were held, to negotiate a collective-bargaining agreement based on the one formulated with Fiorello's Roman Cafe.

As noted, in examining the Employer's statement in its June 25 letter that the Fiorello's Roman Cafe collective-bargaining agreement "probably" gave employees "less" than they would have gotten without the Union, the Regional Director found, to the contrary, that the collective-bargaining agreement had, in fact, produced a wage increase greater than those obtained previously by the employees. In its exceptions, the Employer contends that it offered to present evidence to rebut the Regional Director's findings regarding the wage increases, but that the Region had not pursued its offer.

Because Petitioner's Objection 1 does not allege material misrepresentations in the Employer's letter and because of the manner of our disposition of this case, we find it unnecessary to address the misrepresentation issues. Indeed, the only Petitioner objection alleging material misrepresentations (Objection 2) was withdrawn by Petitioner before the Regional Director issued his report. Furthermore, since the letter was distributed 2 weeks before the election, Petitioner had more than sufficient time to rebut any "misrepresentations." Thus, under any view of the law concerning misrepresentations, the June 25 letter does not establish objectionable conduct.

[6] In *American Telecommunications Corporation, Electromechanical Division*, 249 NLRB 1135 (1980), employees were told that they "didn't need a union [sic] you just pay dues and get nothing for it." *Id.* at 1136. In finding this statement to be objectionable, the Board considered it in the context of a number of other employer assertions which indicated that the employer would give union employees no more than it was willing to grant to unrepresented employees. Thus, the statement was found to reflect the futility of selecting a representative when considered in the *totality* of the employer statements.

The Employer's letter in the instant case admonished employees that unionization would produce "nothing more than you would expect to receive were there no union in the picture. For that, you are afforded the privilege of paying Union dues." Although similar in tenor to the employer assertion in *American Telecommunications*, the Employer's statement with regard to payment of union dues is distinguishable because it is not coupled with further objectionable statements or threats. Considered in isolation, this statement is nothing more than permissible campaign propaganda.

The Regional Director also determined that the Employer, in the last four sentences of paragraph 6, had put employees in fear of losing money or possibly their jobs if they voted for the Union. We construe these statements, however, as nothing more than the Employer's permissible prediction of the effects of unionization. Furthermore, we do not find that the Employer's statements correlate unionization with a loss of job security. The Employer proffered evidence of at least one unfair labor practice charge filed by Petitioner against Fiorello's Roman Cafe and, after the election there, the Employer had filed objections to the election. The Employer avers that this created the tension described in the letter. The Employer's statement is totally devoid of any implication that it would take adverse action against its employees if they selected Petitioner. Accordingly, under all the circumstances, we find nothing objectionable in these statements.[7]

A last comment is in order. In finding that the Employer's letter contained a number of objectionable statements, the Regional Director relied heavily on the Board's decision in *Pacific Telephone Company*, 256 NLRB 449 (1981).[8] However, that case clearly is inapposite. In *Pacific Telephone*, the employer had sent the employees a letter which stated, *inter alia*, that unrepresented employees already received the same benefits as represented employees and this was because of that employer's "long standing policy" to provide all employees similar benefits whether they were represented by a union or not. The employer closed that letter with the admonition that the unrepresented employees "already receive in wages and benefits *all* that you could reasonably expect a union to obtain for you" and further indicated that the employees did not have to pay union dues to receive such benefits. The Board found that this letter constituted a promise of benefits because the employer had indicated that the employees would continue to receive equal benefits with or without a union. The Board also found that this statement indicated to employees the futility of selecting the union as bargaining representative. Here, in contrast to *Pacific Telephone*, the Employer never indicated to employees that it was company policy to treat represented and unrepresented employees alike, and that the Employer would continue this policy. The Employer also did not inform the employees that they were already receiving all that they could expect a union to get for them. Rather, the Employer simply offered its opinion, based on other negotiations with Petitioner, of what Petitioner would seek for the employees and left it to the employees to decide whether or not they felt that this was sufficient. This was permissible campaign propaganda.

On the basis of all the above, we find that the Employer did not exceed the bounds of permissible campaign propaganda under Section 8(c) of the Act. Accordingly, we overrule Petitioner's Objections 1 and 4, and certify the results of the election.[9]

CERTIFICATION OF RESULTS OF ELECTION

It is hereby certified that a majority of the valid ballots have not been cast for Local 6, Hotel, Restaurant and Club Employees and Bartenders Union, AFL–CIO, and that said labor organization is not the exclusive representative of all the employees in the unit herein involved, within the meaning of Section 9(a) of the National Labor Relations Act, as amended.

MEMBER FANNING, dissenting:

I agree with the analysis and conclusions of the Regional Director and for the reasons he gives. [See Appendix B.] Like him, I would set this election aside and conduct another election at an appropriate time.

[7] See *Hiatt Shoe Company Blue Star Shoes, Inc.*, 195 NLRB 554 (1972), in which the employer averred that employees' opportunities for advancement and the potentiality of expansion by the employer would be affected adversely by the "strife and tension" likely to accompany the union's presence. The Board found that these statements did not constitute objectionable threats.

[8] Although we have found that the cases relied on by the Regional Director are distinguishable, in so doing we do not pass on the issue of whether those cases were decided correctly.

[9] Alternatively, the Employer requests that a hearing be held on the alleged material factual issues in this case. In light of our decision here, there is no need to pass on the Employer's request for a hearing.

APPENDIX A

June 25, 1981

Dear Fellow Employees:

As you know, there will be a Union Election on July 9. At that Election each of you will have the opportunity to vote to determine whether or not you want to be represented by the restaurant workers' union.

You are much luckier than the employees at FIORELLO'S, our restaurant on the west side. Some time ago those employees voted to be represented by the restaurant workers' union. They were led down the primrose path by union promises of increased wages and benefits. In fact, after the Election the Union negotiated a contract with the restaurant management which, in my opinion, gave the employees at Fiorello's no more than they would have gotten had there been no union—and probably gave them less. In addition, I believe many of those employees will be hurt by the inflexibility of the Union contract.

On the other hand, you know from the experience of the Fiorello's employees exactly the kind of contract the Union would negotiate if it became your collective bargaining representative. A contract which produces nothing more than you would expect to receive were there no union in the picture. For that, you are afforded the privilege of paying Union dues.

By 1983 those dues will be $23 per month! The Union charges assessments as well as dues. According to the latest Union newspaper, each union member will be required to pay $50 to the Union Defense Fund for the privilege of being a member of the Union. In addition, employees are required to pay initiation fees. You should ask yourself whether or not you believe it an advantage to you or your family to pay those dues and to subject yourself to the possibility of a strike.

We all know that the restaurant workers' union has been heavily infiltrated by organized crime. The Department of Justice stated that the restaurant union "was the classic example of an organized crime takeover of a major labor union." We know that there are individuals with criminal records in high positions in Local 6. IS THIS WHAT YOU WANT?

The restaurant does not want a union at FIORELLA'S! Our experience on the west side has shown that we can negotiate an agreement with the Union which does not cost us any more in wages and benefits than without the Union and may even cost less. But our experience on the west side has also shown us that the presence of the Union results in a tense working relationship with extreme disharmony among the employees. This is a real cost to everyone. It can result in a loss of customers and a loss of income to our employees who serve those customers, as well as to the restaurant itself. The Union benefits no one but itself.

Between now and the time of the Election we will be speaking to you about the Union. We believe that after you have considered all the alternatives you will vote to keep the Union out of our restaurant. Many of you will have questions between now and Election Day. Please don't leave those questions unanswered. Feel free to come to the management of the restaurant. We will answer those questions or obtain answers for you.

APPENDIX B

OBJECTIONS 1 and 4[1]

The sole issue raised by Petitioner to be decided herein arises from a letter dated June 25, 1981,[2] signed by the Employer's general manager Bernard Ray, and distributed to unit employees approximately two weeks before the election. This three-page typewritten letter is attached in its entirety as Exhibit A. It is Petitioner's position that the impact of this letter on the unit employees was so significant as to destroy the required "laboratory conditions" and necessitate overturning the election. Specifically, Petitioner argues that the letter was objectionable in that the Employer impliedly promised employees the same benefits enjoyed by its unionized employees at another location should said employees reject the Union; that the letter also threatened employees with possible loss of pay and benefits if said employees voted for the Union and made clear to employees the futility of voting for the Union.

The Employer asserts that the June 25th letter, evaluated as a whole, is not objectionable. The Employer notes that much of the language in the letter is couched in terms of "opinions", and that the letter itself is based upon true facts. Furthermore, the Employer argues that this letter must be examined in light of all the surrounding circumstances.

For the reasons discussed below, it is concluded that the contents of the June 25th letter are objectionable, and require that the election herein be set aside.

The investigation of the objections revealed that prior to the election conducted on July 9th, the letter (Exhibit A) was mailed on June 25th to all unit employees at their places of residence. The Employer admits the mailing, but argues that, prior to its dissemination, it met with employees wherein it discussed certain issues and answered questions which were subsequently addressed in the letter. Specifically, the Employer asserts that on or about June 15th, Bernard Ray (its general manager), Sheldon Fireman (the Employer's president), and Thomas Budd (the Employer's attorney) met with employees at the Employer's premises and gave them an opportunity to ask questions and discuss the content of the Employer assertions (later recited in the subject letter). The Employer also states that copies of a contract negotiated by Petitioner and involving another restaurant owned by the same Employer (Fiorello's Roman Cafe, Inc., herein Fiorello), and located several blocks away, were available for inspection by the employees. Thus, the Employer contends that due to this discussion, the employees could reasonably believe the contents of the letter.

Petitioner requests that the Board set aside the election based solely upon the contents of the letter itself, and the impact this letter could reasonably be expected to have on eligible voters.

With respect to the Employer's contention that the letter should not be examined in a "vacuum", it is established Board policy that elections should be conducted under "laboratory conditions."[3] Notwithstanding action by the Employer prior or subsequent to distribution of the aforementioned letter, the determinative issue herein is the overall effect on unit employees of the letter.

Specifically, paragraph 2 makes reference to the election previously conducted at Fiorello and the subsequent collective-bargaining agreement negotiated by that restaurant with Petitioner. The paragraph states, *inter alia*, "in fact, after the election the Union negotiated a contract with the restaurant management which, in my opinion, gave the employees at Fiorello no more than they would have gotten had there been no union . . . and probably gave them less." However, an examination of the collective-bargaining agreement indicates that Fiorello employees received, *inter alia*, a 45¢-per-hour wage

[1] By letter dated September 1, 1981, Petitioner requested permission to withdraw Objections 2 and 3. This request hereby is approved.

[2] All dates are in 1981, unless otherwise noted.

[3] *General Shoe Corp.*, 77 NLRB 124 (1948).

increase. Further, it appears that this wage increase was greater than that received by Fiorello employees in the past. In addition, the labor agreement provided Fiorello employees with one additional sick day (a second sick day is to be added in the third year of the agreement), an additional paid holiday and bereavement pay (for absence from work due to a death in the employee's family).

It should be noted that the subject letter speaks of benefits negotiated by Petitioner at Fiorello, not at the instant Employer. The investigation established that there is little or no interchange of employees between Fiorello and the Employer. Consequently, even assuming the validity of the Employer's statements and the fact that the Fiorello labor contract may not have been beneficial to Fiorello employees, there is no evidence to show that the Employer's employees were advised by the Employer of "pre-contract" terms and conditions of employment at Fiorello.

Paragraph 3, page 2, of the subject letter states, *inter alia*, that ". . . we (the Employer) can negotiate an agreement with the Union which does not cost us any more in wages and benefits than without the Union and may even cost less." The Employer asserts that this statement was also made by Petitioner itself at Fiorello collective-bargaining negotiations. In any case, no evidence was adduced that the Employer's employees were present at these Fiorello labor negotiations; nor were Petitioner's representatives present at the June 15th meeting of the Employer's employees to refute or modify the statement attributed to Petitioner.

In analyzing the content of the letter, it is concluded that the language could reasonably be considered to imply that the Employer would provide its employees with the same planned benefits whether or not they chose a union. The Board has recently held in *Pacific Telephone Company*, 256 NLRB 449, 451 (1981), that when an employer makes statements that unrepresented employees would receive, in effect, the same benefits as other represented employees, these statements "constitute the promise of benefits to encourage employees to reject the union and indicates to employees the futility of selecting a representative."

Furthermore, the letter in question not only implies that employees will receive nothing additional by selecting a union, but the letter also states, in the third paragraph of the first page, that the Employer can negotiate "a contract which produces nothing more than you would expect to receive were there no Union in the picture. For that you are afforded the privilege of paying Union dues." Clearly, this language can only be intended to instill in the minds of voters the impression that not only will it be foolish for employees to believe they will receive more benefits if they choose the Union, but that if employees do make such a choice, they will in fact lose benefits by being subject to the additional requirement of paying union dues.

Although it would appear that the language of the letter as discussed, *supra*, would be sufficient grounds for overturning the election, this question need not be reached as there is further "objectionable" language in the letter. The second full paragraph of the second page states that "the restaurant does not want a Union at Fiorella's. Our experience on the West side[4] has also shown us that the presence of the Union results in a tense working relationship with extreme disharmony among the employees. This is a real cost to everyone. It can result in a loss of customers and a loss of income to our employees who serve those customers, as well as to the restaurant itself. The Union benefits no one but itself."

The Board has held in *Turner Shoe Company, Inc.*, 249 NLRB 144, 146 (1980), that "communications which hover on the edge of the permissible and the impermissible are objectionable as it is only simple justice that a person who seeks advantage from his elected use of the murky waters of double *entendre* should be held accountable therefor at the level of his audience rather than that of sophisticated tribunals, law professors, scholars of the niceties of labor law or grammarians."[5] In light of the Board's decision, it must be concluded that the language of the letter set forth immediately above is such that the unit employees would be put in fear of losing money and possibly even their jobs if they voted for the Union.

The Employer defends the use of its language in the aforementioned paragraph by arguing that there had been a charge filed by the Union against the Employer, and that with respect to the election previously conducted at Fiorello, objections had been filed by Fiorello. The Employer asserts that "tension" created by the charge and the previously filed and resolved objections could further lead to certain job actions at the Employer that could diminish the Employer's business. However, this appears to be mere speculation. Consequently, it is concluded that the statements described above are objectionable, and constitute threats to unit employees.[6]

Pacific Telephone Company, supra, involved facts very similar to those presented in the instant case. Both cases involved a letter distributed to unit employees. In both cases the tenor of the letter was that employees would not receive any more benefits by selecting a union and that employees would in fact receive the same benefits as other unionized employees by not selecting the union. In light of the above and on the basis of the Board's decision in *Pacific Telephone Company*, I find that the Employer's June 25th letter constitutes objectionable conduct warranting setting aside of the election.[7] Furthermore, as noted above, there are statements in the Employer's June 25th letter which can arguably be held to be threats to unit employees. As previously discussed, these statements provide an additional basis for overturning the election. Accordingly, based upon all the above, it is recommended that the election be set aside.

[4] This refers to the Fiorello restaurant.

[5] See also *Georgetown Dress Corporation*, 201 NLRB 102 (1973).

[6] See *Propellex Corporation*, 254 NLRB 839 (1981), and *Volleydale Packers, Inc.*, 233 NLRB 1340 (1978), wherein certain threats warranted the setting aside of an election.

[7] See also *American Telecommunications Corp.*, 249 NLRB 1135 (1980).